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In the
Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-5115

JAMES W. RICHARDSON,
PETITIONER,

v.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

BRIEF FOR THE COMMONWEALTH OF MASSACHUSETTS IN OPPOSITION

PETITION NOT PRINTED

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BRIEF FOR THE COMMONWEALTH OF MASSACHUSETTS IN OPPOSITION

Questions Presented

1. Whether giving a deadlocked jury the *Tuey* or *Allen* charge without reference to the prosecution's burden of proof, after the jury had deliberated for twelve hours, and requiring the jury to continue deliberations violated defendant's fourteenth amendment rights to due process of law and trial by jury.

2. Whether the trial court's denial of defendant's motion to poll the jury after the verdict was returned, in the circumstances of the trial, violated defendant's fourteenth amendment rights to due process of law and trial by jury.

Statement of the Case

On September 12, 1972, petitioner was tried in the Superior Court for Middlesex County, Massachusetts, on a charge of armed robbery. A mistrial was declared when the jury failed to reach a verdict. *Commonwealth* v. *Richardson*, 1972 Mass. Adv. Sh. 869; Petitioner's Brief for Certiorari, Appendix B, at 1. At a second trial, on November 8, 1967, petitioner was found guilty by the jury and sentenced to prison for a term of twelve to twenty years. *Id.* The events to which petitioner now objects occurred as follows.

The jury retired at 11:10 a.m., November 8, after instructions by the trial judge. 1972 Mass. Adv. Sh. at 871; Petitioner's Brief at B4. See Brief for Respondent, Appendix A, for the trial judge's instructions to the jury.[1] Twelve hours later, at approximately 11:14 p.m., the jury had not reached a verdict. The trial judge thereupon read to the deadlocked jurors the so-called *Tuey* or *Allen* charge, using substantially the same language as that used in the case of *Commonwealth* v. *Tuey*, 62 Mass. (8 Cush.) 1, 2 (1851). See Petitioner's Brief at 5-6 for the

[1] The record before the Supreme Judicial Court failed to comply with the requirements of Mass. Gen. Laws ch. 231 §113. 1972 Mass. Adv. Sh. at 870; Petitioner's Brief at B2. It consisted of, *inter alia*, a printed record included in petitioner's bill of exceptions, attached to Brief for Respondent as Appendix B, and five bulky exhibits which included a transcript of the trial before the Middlesex Superior Court on November 6-9, 1967 and a trial transcript of the trial before the same court on September 12, 1967, which was declared a mistrial. Only selected portions of the ponderous "record" have been included as appendices to Respondent's Brief.

language used by the trial judge in the instant case. No reference was made by the trial judge to the prosecution's burden of proof, as was made in the original *Tuey* charge. The jury retired for further deliberation and returned a verdict of guilty approximately one hour later, at 12:20 a.m. 1972 Adv. Sh. at 871; Petitioner's Brief at B4. The court denied a request by petitioner to poll the jury. *Id.*

Petitioner filed a motion for a new trial on November 9, 1967 (Record at 9-10). The grounds petitioner raised in support of this motion included allegations that the court, by requiring the jury to continue deliberations at a late hour and by reading the *Tuey* charge had violated his right to a fair trial (R. 9-10). This motion was denied and petitioner's exception saved. (R. 10).

Petitioner next brought a bill of exceptions to the Supreme Judicial Court, pursuant to Mass. Gen. Laws ch. 278 §31. The bill of exceptions contended, *inter alia,* that there was error in denying defendant's motion to poll the jury. Petitioner's conviction was affirmed by the Supreme Judicial Court. *Commonwealth* v. *Richardson,* 354 Mass. 773 (1968). Petitioner then sought a writ of habeas corpus in the Federal District Court for the District of Massachusetts. The petition was dismissed for failure to exhaust state remedies. (R. 10-11).

On November 28, 1969, another motion for new trial was filed by petitioner in the Superior Court. (R. 3, 22). This motion was denied (R. 22). Petitioner claimed exceptions and on September 16, 1970, moved in the Supreme Judicial Court to remand the case to the Superior Court for filing a motion for new trial. (R. 23). This motion was allowed by Justice Spalding of the Supreme Judicial Court, and the court ordered that the case be remanded to the Superior Court as requested in petitioner's motion. On December 10, 1970, petitioner filed a

motion for a new trial and the suppression of evidence. (R. 23). After a hearing on December 14, 1970, petitioner's motion was denied on February 1, 1971. (R. 24).

A bill of exceptions was then brought by petitioner in the Supreme Judicial Court to review the Superior Court's order of February 1, 1970, denying petitioner's motion for a new trial. (R. 25). Petitioner contended, *inter alia*, that the trial court had erred in giving a *Tuey* charge to the jury late at night and in denying the request to poll the jury. 1972 Mass. Adv. Sh. at 871; Petitioner's Brief at B3-4. The Supreme Judicial Court found that the timing of the reading of the *Tuey* charge was a matter of discretion for the trial judge, and found no error. Concerning the denial of the request to poll the jury, the Supreme Judicial Court adhered to its previous holding on the same issue in 354 Mass., wherein it was held that petitioner had relied on facts that were not on the record. 1972 Mass. Adv. Sh. at 871, Petitioner's Brief at B4. The Supreme Judicial Court accordingly overruled petitioner's exceptions, and the denial of the motion for new trial was upheld. *Id.* The Supreme Judicial Court's decision on the above two issues is the basis of the petition for certiorari presently before this Court.

Argument

I. The Decision Of The Massachusetts Supreme Judicial Court That There Was No Error In The Trial Court's Giving The *Tuey* Charge and Denying The Motion To Poll The Jury Was Correct.

A. *The Tuey Charge.*

Petitioner's argument, in essence, is that the circumstances in which the trial judge gave the *Tuey* charge vio-

lated his fourteenth amendment right to a jury trial in that undue coercive pressure was exerted on the jurors. The *Tuey* or *Allen* charge has been the source of much appellate litigation since the initial version was enunciated in *Commonwealth* v. *Tuey,* 62 Mass. (8 Cush.) 1, 2 (1851). The charge is basically a supplemental instruction given to a deadlocked jury that if the opinions of a minority of the jurors disagree with the opinion of the majority, the impasse may be resolved by the minority's consideration of the majority's point of view. *Id.* at 3. It is a common sense suggestion to the triers of fact that they regard the reasonable opinions of others. This Court approved of a literal version of the *Tuey* charge in *Allen* v. *United States,* 164 U.S. 492 (1896), and held that the charge did not violate a defendant's right to trial by jury.

Since the original *Tuey* and *Allen* decisions, there has developed a large volume of cases involving the charge in both state and federal appellate courts. The *Tuey-Allen* charge has often been challenged as violative of the sixth amendment right to a jury trial, a right held binding on the states by the fourteenth amendment. *Duncan* v. *Louisiana,* 391 U.S. 145, 147-58 (1968). The basis of these challenges has been that the charge itself, or the charge coupled with the circumstances in which it was given, has had a coercive effect upon the jury. In the exercise of its constitutional function, the jury must of course be free of undue pressure from the judge. *United States* v. *Spock,* 416 F.2d 165 (1st Cir. 1969).

When challenged on its face, the *Tuey-Allen* charge has invariably been held constitutional. A "trial by jury" does not connote twelve (or less) isolated individuals, with little or no legal expertise, free from all guidance by the court. The parties are entitled to have a jury guided at

all stages by the trial judge, whose learned instruction is, in fact, essential to a fair trial by jury.

> "Trial by jury, in the primary and usual sense of the term at the common law and in the American Constitution, is not merely a trial by a jury of twelve men before an officer vested with authority to cause them to be summoned and impaneled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence. This proposition has been so generally admitted, and so seldom contested, that there has been little occasion for its distinct assertion. *Capital Traction Co.* v. *Hoff*, 174 U.S. 1, 13-14 (1899). *Accord, Patton* v. *United States*, 281 U.S. 276, 288-89 (1930); *Commonwealth* v. *Rollins*, 354 Mass. 630, 638 (1968).

The *Tuey-Allen* charge is a useful method whereby the trial judge, in his sound discretion, assists the jury in the performance of its role as the trier of facts. As such, the charge is in the interests of both parties. See *United States* v. *Hynes*, 424 F.2d 754, 755 n. 1 (2nd Cir.) *cert. denied* 399 U.S. 933 (1970); *Fulwood* v. *United States*, 369 F.2d 960, 962 (D.C. Cir. 1966), *cert. denied* 387 U.S. 234, (1967).

> The considerable costs in money and time to both sides if a retrial is necessary certainly justify an instruction to the jury that if it is possible for them

> to reach a unanimous verdict without any juror yielding a conscientious conviction... they should do so. *United States* v. *Rao*, 394 F.2d 354, 355 (2nd Cir.), *cert. denied* 393 U.S. 845 (1968).

This Court, has not directly considered the charge since the *Allen* case in 1896. However, this Court implicitly approved of the charge as recently as May of 1972 in *Johnson* v. *Louisiana*, 40 U.S. L.W. 4524 (1972). In holding that a unanimous jury verdict is not essential for a conviction under the Constitution, this Court, per Justice White, stated:

> We have no grounds for believing that majority jurors, aware of their responsibility and power over the liberty of the defendant, would simply refuse to listen to arguments presented to them in favor of acquittal, terminate discussion and render a verdict. On the contrary it is far more likely that a juror presenting reasoned argument in favor of acquittal would either have his arguments answered or would carry enough other jurors with him to prevent conviction. A majority will cease discussion and outvote a minority only after reasoned discussion has ceased to have persuasive effect or to serve any other purpose — when a minority, that is, continues to insist upon acquittal without having persuasive reasons in support of its position. At that juncture there is no basis for denigrating the vote of so large a majority of the jury or for refusing to accept their decision as being, at least in their minds, beyond a reasonable doubt. *Indeed, at this point, a "dissenting juror should consider whether his doubt was a reasonable one... [when it made] no impression upon the minds of so many men, equally honest, equally intelligent with himself."*

Allen v. *United States*, 164 U.S. 492, 501 (1896). *Id.* at 4526. (Emphasis added).

It is true, as petitioner points out, that some jurisdictions have discontinued or, to some extent, circumscribed the use of the literal *Tuey-Allen* charge. But in these instances, the decisions were based on *supervisory* grounds because, in the appellate courts' supervisory discretion, the benefits of the charge were considered to have been outweighed by its *potential* for misuse and its tendency to generate appellate litigation. See, e.g., *United States* v. *Thomas*, 449 F.2d 1177 (D.C. Cir. 1971); *United States* v. *Brown*, 411 F.2d 930 (7th Cir. 1969), *cert. denied* 396 U.S. 1017 (1970); *United States* v. *Wynn*, 415 F.2d 135 (10th Cir. 1969), *cert. denied* 297 U.S. 994 (1970); *United States* v. *Fioravanti*, 412 F.2d 407 (3rd Cir.) *cert. denied sub nom. Panaccione* v. *United States*, 396 U.S. 837 (1969); *State* v. *Randall*, 137 Mont. 534, 353 P.2d 1054 (1960); *State* v. *Thomas*, 86 Ariz. 161, 342 P.2d 197 (1959). However, these decisions all rested on supervisory discretion, and *upheld* the constitutionality of the charge itself.

Most of the litigation concerning the *Tuey-Allen* charge has arisen from special circumstances in which the charge was given or from cases where substantial variations from the language of the original charge have occurred. Indeed, on several of these occasions, courts have found that the totality of circumstances did amount to constitutionally coercive pressure on the jury. Most of these cases involve situations where the trial judge made statements in addition to the charge itself. See, e.g., *United States* v. *Thomas*, *supra*, at 1182-83, where the trial judge, in addition to the *Allen* charge, said that he was "not going to declare a mistrial, and thereby require a retrial of this case before some other jury;" *Green* v. *United States*, 309

F.2d 852, 853 (5th Cir. 1962), a case in which the trial court gave the *Allen* charge, and further instructed the jury "... it is the duty of the minority to listen to the argument of the majority with some distrust of their own judgment because the rule is that the majority will have better judgment than the mere minority ... ;" *Powell* v. *United States,* 297 F.2d 318, 319-20 (5th Cir. 1961), where the judge added to the original charge that "It is no credit to a juror to stand out in a pure spirit of stubborness" and "If you follow the principles of law given you by the Court and if you recall the evidence, you ought to be able to agree on a verdict."

Of course, in the instant case, the trial judge added no such prejudicial embellishments. Rather, petitioner assigns two factors which, on the facts, he claims produced an unconstitutional charge to the jury amounting to coercive pressure by the trial judge. These factors are (1) the omission of any reference to the prosecution's burden of proof and (2) the particular hour, 11:14 p.m., at which the charge was read and the jury was ordered to continue deliberating.

1. *Omission of a Statement of the Prosecution's Burden of Proof Does Not Render A Tuey-Allen Charge Unconstitutional.*

The Massachusetts Supreme Judicial Court has held that the omission of a reference to the prosecutor's burden of proof in reading the *Tuey-Allen* charge is not prejudicial. *Commonwealth* v. *Rollins,* 354 Mass. 630, 638 (1968). The court reasoned that the precise language of the charge must be left to the trial judge's discretion. *Id.* Of course, instructions concerning the prosecution's burden of proof should be read in the initial instructions to the jury. *Agnew* v. *United States,* 165 U.S. 36, 51-52 (1897);

Coffin v. *United States,* 156 U.S. 432, 452 (1895). *Cf. In Re Winship,* 397 U.S. 358, 362-64 (1970). However, once these instructions have been given, there is no purpose served by repetition in the *Tuey-Allen* charge.

The Ninth Circuit dealt squarely with this issue in *Sullivan* v. *United States,* 414 F.2d 714 (9th Cir. 1969). The court found no prejudicial error in not mentioning, in the *Tuey-Allen* charge, that the prosecution's evidence must establish guilt beyond a reasonable doubt, once this point has already been emphasized in the initial instructions to the jury. *Id.* at 717. In summarizing the essentials of a proper supplemental charge to a deadlocked jury in *Allen,* this Court made no reference to a repetition of the burden of proof. 164 U.S. at 501. The First Circuit has said the trial judge should remind the jury of the burden of proof in administering the *Tuey-Allen* charge, *United States* v. *Flannery,* 451 F.2d 880, 883 (1st Cir. 1971), but that it is not plain error to omit the reference. *Pugliano* v. *United States,* 348 F.2d 902, 903 (1st Cir. 1965).

The original *Tuey* charge did contain a brief reminder of the prosecution's burden of proof. However, this reminder is peripheral to the function of the charge — to assist the jury in reaching a verdict. No court has ever held a *Tuey-Allen* charge unconstitutional because it failed to mention the burden of proof. In the case at hand, at the trial, the judge explicitly mentioned the prosecution's burden of proof at least seven different times. See Brief for Respondent, Appendix at 1, 4, 10, 11, 12, 13 and 14. The nature of the prosecution's burden was painstakingly explained and occupied a substantial portion of the initial charge. *Id.* at 12-13. A reading of the initial instructions in Appendix A will show that it is inconceivable that the jury was not clearly aware of the burden of proof.

The omission of a needless appendage does not render a constitutionally sound charge invalid. No court has ever so held. The record in the present case clearly indicates that the jury was well aware of the prosecution's burden of proof. Thus, the omission of a restatement of the burden did not effect the constitutionality of the charge.

2. *Administering the Tuey-Allen Charge To A Deadlocked Jury at 11:14 P.M., After Twelve Hours of Deliberations, and Requiring the Jury To Deliberate Further Does Not Infringe Petitioner's Constitutional Rights Under the Fourteenth Amendment.*

The *Tuey-Allen* charge is by its very nature a discretionary device for the trial judge. It should be used only where the jury has arrived at an impasse, and, in the opinion of the judge, the interests of justice would best be served by reminding the jurors that they conscientiously listen to the opinions of one another. See, e.g., *United States* v. *Hynes,* 424 F2d 754, 755 n. 1 (2nd Cir.), *cert. denied,* 399 U.S. 933 (1970); *United States* v. *Rao,* 394 F.2d 354, 355 (2nd Cir.), *cert. denied* 393 U.S. 845 (1968).

It must be remembered that jurors are laymen with dissimilar backgrounds and personalities. The only common denominator among the jurors is their lack of expertise in the nuances of our legal system. The notion of collective judgment, which is inherent in jury trials, permeates the fabric of democratic society. However, in any circumstances, a collective judgment is very difficult to arrive at, since reasonable men inevitably will disagree. The jury room is no different in this respect than any other institution in American society. The problems of reaching a jury verdict in federal trials and, until recently, in state trials, were even more difficult, due to the unanimity requirement.

This Court recognized the problems of collective judgment in holding that unanimous jury verdicts are not constitutionally mandated in *Johnson* v. *Louisiana*, 40 U.S.L.W. 4524 (1972) and *Apodaca* v. *Oregon*, 40 U.S.L.W. 4528 (1972).

When twelve legally inexperienced laymen are unable to reach a collective decision after being afforded a reasonable opportunity to do so, as occurred in petitioner's trial, it is not offensive to one's sense of justice for the judge to suggest that the dilemma might be resolved by a careful weighing of the ideas of other jurors. This is especially true when the judge reminds the jurors that in considering their fellow jurors' arguments, their own conscientious convictions should not be sacrificed. This *caveat* was contained in the original *Tuey* charge and in the version rendered at petitioner's trial. Petitioner's Brief at 5-6.

The problem facing any trial judge in a case where the jury is having difficulty in arriving at a verdict is at what point after the jury has begun deliberation the *Tuey-Allen* charge, if called for, should be read. This decision necessarily must be a matter of discretion, since the circumstances of each case vary. Any arbitrary rule by an appellate court on the time at which the charge should be read, given the infinite number of variables present in each case, would be inadequate and an unwarranted interference with the discretion of trial courts. See *Hale* v. *United States*, 435 F.2d 737, 742 (5th Cir.), *cert. denied* 402 U.S. 976 (1970).

Petitioner asks the Court to arbitrarily decide that twelve hours of jury deliberation is too long and 11:14 p.m. too late for the use of the charge. He cites no authority for his request beyond a survey of how certain appellate courts either use the charge or, in the exercise of their supervisory discretion, have circumscribed its use.

In fact, precedent cuts strongly against petitioner's argument. The mere fact that a jury has deliberated for a long

period of time and is not allowed to separate is not, of itself, prejudicial. See, e.g., *United States* v. *Haupt*, 330 U.S. 631, 643 (1947), where this Court rejected the contention that a verdict of guilty was coerced in a prosecution for treason, where the jury deliberated for twenty-eight hours without sleep; *Hyde* v. *United States*, 225 U.S. 347 (1912), where the Supreme Court found no error in the fact that a jury sat in consultation for three days and nights (with recesses). The Court stated:

> It is true the trial was a long one and that the jury was not allowed to separate. Neither fact is unusual in criminal trials; the first is often unnecessary, the second often expedient, and contributes to an impartial judgment for and against defendants. *Id.* at 383. See *United States* v. *Grosso*, 358 F.2d 154, 159 (3rd Cir. 1966); *DeVault* v. *United States*, 338 F.2d 179, 182 (10th Cir. 1964); *Mills* v. *Tinsley*, 314 F.2d 311, 313 (10th Cir.), *cert. denied*, 374 U.S. 847 (1963); *United States* v. *Minieri*, 303 F.2d 550, 556 (2nd Cir.), *cert. denied*, 371 U.S. 847 (1962); *Jenkins* v. *United States*, 149 F.2d 118, 119 (5th Cir.) *cert. denied*, 326 U.S. 721 (1945). Cf. *United States* v. *Barash*, 412 F.2d 26 (2nd Cir.) *cert. denied* 396 U.S. 832 (1969); *O'Rourke* v. *United States*, 347 F.2d 124 (9th Cir. 1965).

It is noteworthy that in the *Hyde* case, the verdict was challenged as having been coerced because the jury did not want to face *another day* of deliberations. Thus, if a trial judge recesses a jury after a long day of deliberations, requiring further deliberations the following day, he confronts the risk that his action will be challenged as coercive. See *Kawakita* v. *United States*, 190 F.2d 506, 528 (9th Cir. 1951), *aff'd*, 343 U.S. 717 (1952), where it was held

that the purpose of keeping a jury together and not permitting separation except under the supervision of a bailiff is to make sure that no external sources influence the jurors. If, however, the judge reads the *Tuey-Allen* charge to avoid the necessity of reconvening the jury, this also, according to petitioner, is coercive. The trial judge is placed in a "damned if you do, damned if you don't" situation whichever way he exercises his discretion. The possibility of such a dilemma explains the hesitancy of appellate courts to overrule as "coercive" matters within the trial judge's discretion.

The fact that the jury was ordered to continue deliberations at 11:14 p.m. is not unusual in criminal cases, or prejudicial. In *United States* v. *Parks*, 411 F.2d 1171 (1st Cir. 1969), the First Circuit discussed the undesirability of keeping jurors at work "until the small hours of the morning." *Parks* involved a situation in which the jury presented a verdict at 3:07 a.m. While disapproving of the holding of the jury until this late hour, the court stated:

> The better practice in our opinion would be [to release the jury] *at midnight or so* unless there were indications of a speedy verdict. *Id.* at 1173. (Emphasis added).

In the present case, the jury delivered the verdict at 12:30 a.m., clearly within the "midnight or so" time frame of *Parks*.

Precedent establishes that neither keeping a jury in deliberation for twelve hours nor reconvening the jury for further deliberation at 11:14 p.m. *per se* establishes prejudicial error. Some courts have held that keeping the jury, when accompanied by other circumstances, can amount to error. 358 F.2d at 159. However, these other circumstances must be of a blatantly coercive nature. See, e.g., *United*

States v. *Pleva,* 66 F.2d 529, 531-33 (2nd Cir. 1933), where an elderly juror testified in open court that he was seriously ill and would agree with the verdict if required to deliberate any further only because he was physically unable to continue.

Petitioner seeks to equate the *Tuey-Allen* charge with those special circumstances such as a sick juror, which, when combined with long prior deliberation and a late hour, create a *prima facie* atmosphere of coercion. This contention has been squarely rejected by appellate courts. In *United States* v. *Betancourt,* 427 F.2d 851 (5th Cir. 1970), the defendant claimed that his constitutional rights were violated when the trial judge read the *Tuey-Allen* charge eleven and one-half hours after the beginning of the trial. On appeal, the Fifth Circuit rejected this contention, noting that while a recess might have been better, trial courts are necessarily vested with wide discretion in controlling day-to-day operations. *Id.* at 854-855. This is essentially the same view taken by the Massachusetts Supreme Judicial Court with respect to petitioner's bill of exceptions. That court stated:

> There was a substantial reason for reading the charge at some time, although (considering the hour) it might have been better judgment to have allowed the jury to suspend deliberations until the morning. What the judge did, however, was within his discretion. 1972 Mass. Adv. Sh. at 871, Petitioner's Brief at B4.

In *Betancourt,* the court further held that the nonprejudicial effect of the timing of the *Tuey-Allen* charge was supported by the fact that neither counsel nor the jury requested a recess. *Id.* This is also true of the present case.

In *United States* v. *Sawyers,* 423 F.2d 1335 (4th Cir. 1970), the Fourth Circuit upheld a verdict of guilty where

the trial judge read the *Tuey-Allen* charge after the jury had deliberated for fifteen hours. In support of its decision, the court noted:

> There was not the slightest intimation of impatience with the minority, nor any words that could be construed as a threat or even an expression of displeasure. It is not suggested to us that the judge's tone of voice and facial expression (aspects that cannot appear in the record) were other than calm and dispassionate. *Id.* at 1340.

In *United States* v. *Pope*, 415 F.2d 685 (8th Cir. 1969), *cert. denied*, 397 U.S. 950 (1970), the defendant alleged coercive influence where the *Tuey-Allen* charge was read after the jury had considered the case without decision for eleven hours. The Eighth Circuit held:

> [T]he deliberation for approximately 11 hours was not so unreasonable in duration as to require the court to declare a mistrial. The time a jury may deliberate is within the sound discretion of the trial judge. *Id.* at 690.

In the instant case, it was not prejudicial for the trial judge to require the jury to continue deliberations at 11:14 p.m. after twelve hours of indecision. Neither the length of time the jury labored, nor the hour the verdict was returned, seem either extraordinary or prejudicial in light of the opinions above. The administration of the *Tuey-Allen* charge did not, in these circumstances, spawn a coercive atmosphere, as petitioner maintains. The Massachusetts Supreme Judicial Court correctly found no error in this regard.

B. *Denial Of The Motion To Poll The Jury.*

There is no constitutionally protected right to poll the jury. In federal courts and state jurisdictions where there is a right to poll the jury, this right is granted by statute.[2] Petitioner concedes that "very little authority exists on the question of whether the right [to poll the jury] is one so basic as to be protected by constitutional requirements of due process and jury trial." Petitioner's Brief at 12. The obvious reason for the sparcity of authority is that there is no such constitutional right.

In discussing the matter of jury polls in *Humphries* v. *District of Columbia,* 174 U.S. 190 (1899), this Court said:

> That generally, the right to poll a jury exists may be conceded. Its object is to ascertain for a certainty that each of the jurors approves of the verdict as returned; that no one has been coerced or induced to sign a verdict to which he does not fully assent. It is not a mater which is vital, is frequently not required by litigants; and while it is an undoubted right of either, *it is not that which must be found in the proceedings in order to make a valid verdict. Id.* at 194. (Emphasis added).

Subsequent to the *Humphries* case, Rule 31(d) of the

[2] See, e.g., 18 U.S.C., Fed. Rules Cr. Proc. rule 31(d); 17 Ariz. Rev. Stat. Ann., Rules Cr. Proc. rule 284 (West 1956); Ark. Stat. Ann. Penal Code §1163 (Deering 1971); Fla. Stat. Ann. §919.10 (West 1944); Idaho Code Ann. ch. 19 §2316 (Supp. 1971); Burns Ind. Stat. Ann. §1811 (1956); Iowa Code Ann. §785.15 (West 1970); La. Stat. Ann. Code Crim. Proc. art. 812 (West 1967); Minn. Stat. Ann. §631.16 (West 1947); Mont. Rev. Code §94.7416 (1947); Neb. Rev. Stat. §174.531 (1971); N.Y. Consol. Laws, Code Cr. Proc. §450 (McKinney 1958); N.D. Cent. Code §28-14-23 (1960); Ohio Rev. Code §2945.77 (1970); Okla. Stat. Ann. ch. 22 §921 (West 1958); Ore. Rev. Stat. §17.355 (2) (1961); Utah Code Ann. §77-33-10 (1953); Wyo. Comp. Stat. §10-1401 (1945).

Federal Rules of Criminal Procedure was adopted. This rule states:

> When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion. If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged.

The function of Rule 31(d) is to give to each juror the opportunity to declare in open court his assent to the verdict. It assures the parties and the court that a unanimous verdict has been reached. *Miranda* v. *United States*, 255 F.2d 9, 17 (1st Cir. 1958). The rule may also serve a further useful function by clearing up apparent confusion among the jurors as to the exact nature of the verdict before the verdict is recorded. *Williams* v. *United States*, 419 F.2d 740, 746 (D.C. Cir. 1969). Rule 31(d) is a procedural device used in federal courts. It is not a constitutional requirement, and no court has held the rule out as such. *Havsrath* v. *N.Y. Central R.R. Co.*, 401 F.2d 634 (6th Cir. 1968); *Hernandez* v. *Delgado*, 375 F.2d 584, 585 (1st Cir. 1967). Cf. *Gordon* v. *United States*, 438 F.2d 858, 873-74 (5th Cir.), *cert. denied* 404 U.S. 828 (1971).

Since the rule is not based on a constitutional mandate, it is not binding on the states. See *Brooks* v. *Gladden*, 226 Ore. 191, 358 P.2d 1055 (1961). In Massachusetts, and other states without a procedural rule corresponding to Federal Rule 31(d), the function of the rule is usually served when the court clerk, upon reading the verdict, makes a collective inquiry of the jury. The clerk asks whether the jurors agree with the verdict. This is considered sufficient security to assure that the verdict expresses the opinion of the jury. *Commonwealth* v. *Golden*-

burg, 338 Mass. 377, 386 (1959); *Commonwealth* v. *Costley*, 118 Mass. 1, 28 (1875); *Commonwealth* v. *Roby*, 29 Mass. (12 Pick.) 496, 513-15 (1832). *Accord*, 226 Ore. 191, 358 P.2d 1055; *State* v. *Tucker*, 146 Conn. 410, 151 A.2d 976 (1959); *State* v. *Grierson*, 96 N.H. 36, 69 A.2d 851 (1949); *Ryan* v. *People*, 50 Colo. 99, 114 P. 306 (1911); *In Re Fellows*, 5 Me. 333 (1888). It would be a rare and anomalous occurrence where jurors would listen to, or speak collectively in support of, the jury foreman, and immediately contradict themselves if polled individually immediately thereafter. 375 F.2d at 586. Thus, states without a rule similar to Rule 31(d) consider such a rule unnecessary.

In the instant case, the trial court accomplished the same effect as an individual poll when the clerk asked the jury collectively if they agreed with the verdict as read. Brief for Respondent, Appendix at 15. Petitioner contends, however, that facts surrounding his motion to poll the jury created a constitutional right to have his motion granted. He states that the time the jury deliberated, the *Tuey-Allen* charge, and the hour at which the charge was read trigger a constitutional right to have the jury polled. Petitioner's conclusion is a *non sequitur*. There was no unconstitutionality in the reading of the *Tuey-Allen* charge, in the time at which the charge was read, or in the length of jury deliberations, as discussed *supra*. The combination of these elements does not give birth to a right to poll the jury.

The Massachusetts Supreme Judicial Court, accordingly, found no merit to petitioner's contention. 1972 Mass. Adv. Sh. at 871. Petitioner's Brief at B4. The court adhered to its prior consideration of the issue in 354 Mass. 773, where it was held that petitioner had relied on numerous facts in support of his position that were not in the record. These facts, which petitioner alleged but could not support in his first bill of exceptions, in 1968, were:

> The jury consisted of two women, a male juror with a physical disability, and several other older jurors. These people had been deliberating for thirteen hours and there was no apparent end in sight. Either they came back with a decision or they remained out. Given the physical makeup of the jury and the time element involved, it is clear that there was physical duress involved. The jurors were thus highly susceptible to assenting to a decision in which some of them did not agree. As stated previously, there was a disagreement between the jurors and then there was an agreement, which given the totality of the circumstances is highly suspect. Brief for Defendant, pp. 15-16, *Commonwealth* v. *Richardson*, 354 Mass. 773 (1968). See Brief for Respondent, Appendix at 16-20.

Petitioner cryptically alleges that on the second bill of exceptions brought before the Supreme Judicial Court in 1972, "the record had been implemented to assure that all relevant facts both with respect to the argument of 'absolute right' and abuse of discretion were included." Petitioner's Brief for Certiorari at pp. 9-10. However, in the second bill of exceptions before the Supreme Judicial Court, the record was not "supplemented." All that was alleged in the second bill of exceptions, in addition to that which was alleged in the first, was:

> It is entirely conceivable that one or more jurors were coerced by their fellows into their verdict because of the lateness of the hour and the giving of the *Tuey* charge and might have so stated if polled. We respectfully submit that under these circumstances an abuse of discretion occurred when the court below denied the motion to poll the jury. Brief for Defendant, p. 39, *Commonwealth* v. *Richardson*, 1972 Mass. Adv. Sh. 869. See Brief for Respondent, Appendix E.

Thus, it is clear that no additional facts were brought to the Supreme Judicial Court's attention in the second bill of exceptions, and that there was no error in the court's overruling of petitioner's exception concerning his constitutional right to poll the jury.

II. The Petition Fails To Raise A Substantial Federal Question On Either Issue Presented.

A. *The Tuey-Allen Charge.*

Neither the omission in the charge of a reference to the prosecutor's burden of proof nor the giving of the charge at 11:14 p.m. and the requiring of the jury to continue deliberations coerced the jury in such a way as to constitute a deprivation of due process. Petitioner conjures up a fallacious equation in his allegation that both of these circumstances, taken together, amounted to unconstitutional pressure. The trial judge explicitly impressed upon the jurors the prosecutor's burden of proof in his initial instructions. The length of time that the jury had been deliberating and the hours at which the charge was read and the verdict rendered were neither unusual nor prejudicial.

No substantial fourteenth amendment issue is presented by either circumstance, individually or both together. The petition alleges unconstitutionality in circumstances which on their face and on their facts contain no constitutional error. *Palmer Oil Corp.* v. *Amerada Petroleum Corp.*, 343 U.S. 390, 391-392 (1952); *Zucht* v. *King*, 260 U.S. 174, 177 (1922). There is not substantial disagreement among lower federal or state courts on the issues. The decisions petitioner relies upon as presenting "disagreement between and among the state and lower federal courts" involve *supervisory* decisions concerning the exact scope to be given to *Tuey-Allen* type charges within such jurisdictions. As such,

they represent differences in view as to how to apply a principle which allows considerable room for discretion. No authority is cited for overturning the charge on constitutional grounds because of either an omission of a reference to the burden of proof or the timing of the charge.

B. *The Denial Of The Motion To Poll The Jury.*

There is no constitutionally protected right to poll the jury. Again, petitioner asks the Court to chase the shadow of constitutional error in a situation which on its face and on its facts reveals none. The most that can be said for petitioner's argument is that, given the totality of circumstances, a *potential* for coercion might have existed.

Appellate courts will not probe into jurors' heads to guess what might have motivated the verdict and are reluctant to impute disregard of a jury's constitutional functions. *Fairmount Glass Works* v. *Cub Fork Coal Co.*, 287 U.S. 474, 485 (1933); *Holt* v. *United States*, 218 U.S. 245, 251 (1910); *Gordon* v. *United States*, 438 F.2d 858, 873-74 (5th Cir.), *cert. denied* 404 U.S. 828 (1971). As stated by Mr. Justice Holmes in *Holt*:

> If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trials under the conditions of the present day. 218 U.S. at 251.

Petitioner shows no more than an opportunity for prejudice. This Court has traditionally refrained from engaging in the sort of hypothesizing of unconstitutionality which is sought in this petition. The discretion of the Court will not be exercised to entertain purely academic questions. *Rice* v. *Sioux City Cemetery*, 349 U.S. 70, 74 (1955); *Layne & Bowler Corporation* v. *Western Well Works*, 261 U.S. 387, 393 (1923).

Conclusion

The decision of the Massachusetts Supreme Judicial Court that no constitutional error existed in the circumstances in which the *Tuey* charge was read at petitioner's trial, or in the denial of petitioner's motion to poll the jury, was manifestly correct. The *Tuey* charge itself is constitutional on its face. There is no need for repeating the burden of proof that must be borne by the prosecution once that fact has been impressed upon the jury in the initial instructions. The length of time the jury deliberated, and the times at which the charge was read and verdict returned were neither unusual nor prejudicial for criminal trials.

There is no absolute right to poll the jury. Jurisdictions which grant such a right do so on supervisory, rather than constitutional, grounds. The particular events which occurred at petitioner's trial did not create such a constitutional right.

No substantial federal questions are raised by the petition. The particular circumstances of this case are not often encountered and present the kind of academic and episodic issues this Court has traditionally considered as not meriting certiorari. No novel, unsettled or important question is presented. The threshold requirements of 28 U.S.C. §1257(3) for granting certiorari have not been met. Wherefore it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A

Stenographic Transcript of Trial Judge's Charge to Jury

THE COURT. Mr. Foreman, ladies and gentlemen, I have asked you to stand in your place, as I stand here now in mine, at the beginning of my instructions to you, the jury, in observance of an ancient custom of this Court. As our ancestors stood, so we stand in recognition of the supremacy of the law in all our human affairs.

Now, the defendant, James W. Richardson, has been put to trial on an indictment which charges him with the crime of robbery while being armed.

The trial has proceeded on the basis that this indictment has been properly and adequately pleaded to. You, the jury, are to pass upon the guilt or innocence of this defendant.

This duty cannot be properly performed unless the rights of the Commonwealth and of this defendant are fully and properly protected.

It is the right of the Commonwealth to a conviction if and so far as you, the jury, find that the Commonwealth has proved this charge beyond a reasonable doubt.

It is the right of the defendant to an acquittal if and so far as you, the jury, find that this charge has not been sustained.

Now, it is very important in the administration of justice that no innocent person be convicted or punished for crime. It may be that, as men and women, as individuals, that you are moved to sympathy or compassion for this defendant or for the parties who have been harmed or wronged.

But, Mr. Foreman, and members of the jury, sympathy or compassion should not enter into your verdict. You are sworn to make true deliverance between the Commonwealth and this defendant according to the law and to the evidence.

You may be seated.

(Jury sat down.)

THE COURT. Mr. Foreman, ladies and gentlemen of the jury, you have heard all the evidence in this case and I wish to impress upon each and every one of you that if your recollection concerning the testimony given in the trial of this case is different from the recollection of counsel or the Court, you are to call upon your own recollection and your own understanding of the testimony in arriving at a verdict in this case.

It is your own recollection and your own understanding that is to guide you in arriving at a verdict in this case, and not the recollection and understanding of cousel or of the Court.

You may recall that in your opening instructions you were instructed that the whole and sole responsibility of deciding facts rested with you, the jury. This duty cannot be trespassed upon by counsel, by the Court, or by anybody else because from the beginning I wish to impress upon each and every one of you that you, the jury, are the sole judges of the facts.

You, the jury, not only have the right, but it is your duty to draw certain inferences from the facts. The law recognizes it as logical and proper that one fact may exist from the proof of the existence of another.

Now, such inferences as you, the jury, may draw from the facts must be based upon the trustworthy, the credible evidence, and must not be based on surmise, speculation, imagination, or conjecture.

Now, you, the jury, have heard all of the evidence in the trial of this case. You have seen the witnesses here in this courtroom. You, the jury, being the sole judges of the facts, it necessarily follows that you, the jury, are the sole judges of the credibility of the witnesses.

Now, in determininig the weight and the credit and the value that you will attach to the tesimony of any one witness, you, the jury, should take into consideration the following:

The conduct and the appearance of the witness on the stand; the interest of the witness, if any, in the result of this trial; the motive of the witness in testifying; the witness' relation to or feeling for one party or the other; the probability or the improbability of the witness' testimony; the opportunity that the winess had to observe or to be informed as to matters respecting which such witnesses have given testimony; the inclination of the witness to speak the truth or otherwise as to matters within the knowledge of that particular witness.

Now, you, the jury, should take all of these matters into your consideration and, together with all the other facts and circumstances given in the trial of this case, it's within your province to give to the testimony of each witness such weight and value as you, the jury, may determine.

You may accept the testimony of a witness in its entirety if you determine it's true; and by the same token, you may reject the testimony of a witness in its entirety.

You may accept part of what a witness testifies to and reject the remainder. In short, you will apply your plain everyday common sense in making your appraisal of the weight and the value that you will attach to the testimony of any one witness.

Now, Mr. Foreman, members of the jury, I wish to instruct you that while this indictment will be taken with you to your jury room when you retire for your deliberations, I wish to instruct you that this indictment is not any evidence in this case and you are not to be influenced by any statement in this indictment.

The only evidence that you are to concern yourselves with in arriving at a verdict in this case is the evidence that you have heard from the lips of the witnesses here in this courtroom, together with the exhibits that you will take with you when you retire to your jury room for your deliberations. That is the only evidence that you are to

concern yourselves with in arriving at a verdict in this case.

You do not consider any arguments made by counsel other than those based on the facts which you find true in this case, nor any conclusions which they may draw from their arguments or from the facts except as they appeal to you as reasonable conclusions for you, the jury, to draw from the facts that you, the jury, find true in this case.

Now, Mr. Foreman, members of the jury, in every criminal case each defendant is protected under the Constitution of our Commonwealth and the laws of our Commonwealth by two great bulwarks against the unjust invasion of a defendant's rights and liberty in order to promote justice and fairness to the accused and to assure to him the fullest protection under our laws.

The first of these great bulwarks is that every criminal defendant at the outset of the trial is presumed to be innocent.

The second great bulwark — fully as important as the first and on which I will instruct you more later — is that the Commonwealth must prove the charge beyond a reasonable doubt.

Now, Mr. Foreman, members of the jury, as I have already told you, every criminal defendant charged in this court with having committed a crime is presumed at the outset of the trial to be innocent. This presumption is not evidence. It is a rule of evidence and this governs until sufficient evidence to the contrary appears.

The fact that a defendant is suspected, arrested, or indicted is not to be regarded as any circumstances or evidence of his guilt and it is not to be regarded as creating any unfavorable impressions against him.

He is not to be found guilty on suspicion, probability, or conjecture. This defendant is to be found either guilty or

not guilty here and now by you, the jury, upon the legal evidence given in the trial of this case and not on the fact that he has been arrested, complained against, or indicted.

Now, Mr. Foreman, members of the jury, you will notice that this indictment charges this defendant, James W. Richardson, with having assaulted one Harold Malkonian, Ralph Porcaro, Joseph Keenan, and John Tacey on December 15, 1966, in Watertown, while armed with a dangerous weapon, with intent to rob them and did, in fact, rob them.

Now, this indictment was brought under the provisions of General Laws, Chapter 265, Section 17, which reads as follows, with the immaterial provisions omitted, and I am now quoting from this particular section:

"Whoever, being armed with a dangerous weapon, assaults another and robs, steals or takes from his person money or other property that may be the subject of larceny", shall be punished. That is the end of that particular section.

Now, the offense of robbery while armed with a dangerous weapon is an aggravated form of common-law robbery.

The essence of robbery is the exertion of force, actual or constructive, against another in order to take personal property of any value whatsoever, with the intention of stealing it, from the protection which the person of that other affords.

Robbery requires that the taking of money or property must be accompanied with an intent to steal. Robbery is at once a crime against the person and a crime against the property.

The force and violence of putting in fear must be the means by which the larceny is effected and must be prior to or simultaneous with it.

You will notice that the indictment states that the defen-

dant did assault Harold Malkonian, Ralph Porcaro, Joseph Keenan, and John Tacey with intent to rob and steal.

In order to prove the crime of robbery, it is not necessary to prove that the defendant took the property from the person of the owner. It is enough when the property or money was in the owner's possession and protection and control and that he was compelled to surrender it by the violence or fear caused by the defendant.

An assault and larceny or stealing are essential elements of the crime of robbery.

We will now take up the different elements of the crime of robbery while being armed with a dangerous weapon. The statute says:

"Whoever, being armed with a dangerous weapon". First, I must give you the legal definition of a dangerous weapon.

In law, a dangerous weapon is any instrument or instrumentality so constructed or so used as to be likely to produce death or great bodily harm.

In law, a dangerous weapon may also be defined as an instrument or instrumentality which, because of the manner in which it is used or attempted to be used, endangers life or inflicts bodily harm or injury or is calculated or likely to produce death or serious bodily injury.

In this case there was some evidence of a gun. The law says that it is a question for you, the jury, to determine whether the instrument alleged to have been used was or was not a dangerous weapon. This is one of those questions that is within your province as jurors to decide.

I wish to point out to you also that the use of a dangerous weapon is not an essential element on a charge of robbery while armed.

The statute says:

"Whoever, being armed with a dangerous weapon". In considering whether the weapon claimed to have been used

in this case is a dangerous weapon, you can consider the likelihood of its use in making it a dangerous weapon.

If you, the jury, find that it was a dangerous weapon, it is not necessary for the Commonwealth to prove that the dangerous weapon was actually used to prove the offense of robbery while armed — for the gist of the offense is being armed, not the use of the weapon.

The law says: Proof that a person accused actually used a dangerous weapon is not essential on a charge of robbery while armed. The main or material point is whether he was armed — not how he employed the alleged weapon.

Now, getting back to the statute again, it says:

"Whoever, being armed with a dangerous weapon, assaults another". What is meant by an assault? An assault, Mr. Foreman, members of the jury, is a present attempt to do bodily injury to another coupled with a present ability to commit it.

Any threatening gesture showing in itself or by words or anything accompanied with it an immediate intention, coupled with a present ability to do bodily harm to another, is an assault.

To commit an assault, you need not actually strike some other person. An assault can be committed by a person without touching the body of the person assailed in any way.

If you were to strike the other person, then this would be a battery.

Now, the statute that we are considering requires only an assault and not an assault and battery.

Now, once again, back to the statute. The statute says:

"Whoever, being armed with a dangerous weapon, assaults another and robs, steals or takes away from his person money or other property". Now, notice that word, "and". There must be an assault and robbing or an assault and stealing or a taking away of money or other property.

There must be an assault for a conviction under this statute whether the concomitant acts are robbing, stealing, or taking away.

The statute uses the word, "rob". To rob is for a person to take and carry away the personal property of another from his person or from his possession and control against his will, either by force or violence or by putting the victim in fear, with the intent to steal.

Now, concerning stealing, in defining one alternative way of committing larceny, the Legislature of our Commonwealth uses the word, "steal".

To steal, for the purposes of this case, is to take and carry away unlawfully the personal property of another with intent to deprive him of its permanent use.

Now, you will note that ordinary stealing and larceny can be accomplished without violence or putting the victim in fear. But, for robbery, the essence of the crime is the exertion of force either by actual violence by assaulting the person from whom the property is taken or by means of an assault on such person and putting him in fear.

The next element for consideration for the crime of robbery being armed is that the things taken must be "money or other property that may be the subject of larceny". Robbery may be committed by an offender in order to take property of any value whatsoever, great or small. It might be a huge amount or it could be pennies.

The next element of robbery is that the property shall be taken from the person or the body of the clothing of the person robbed or from the protection which the person of the other one affords.

Of course, if an offender, after an assault, reaches into the pockets of the clothing of the one he assaults and takes and carries away cash, property, that is one way to prove this element of robbery.

Robbery may be committed without taking any property

away from the body of the owner. It may be committed without showing that the offender even touched the body or the person of the one robbed.

If property is taken and carried away by an offender and that property was within the control and the protection of the owner or one actually in rightful possession of it, and if, by assault and threat, such person was put in fear and was compelled to surrender it, that would be enough to establish this element of the crime of robbery.

A thing is in the presence of a person, in respect to robbery, which is so within his reach, inspection, observation and control, that he could, if not overcome by violence or prevented by fear, retain possession of it.

Now, the next element of the crime of robbery that must be proven by the Commonwealth is that the money or property taken from the victim must be taken and carried away by the offender, and that the money or property taken was taken against the will of the owner, and, further, that the taking and carrying away of the money or property was done by the offender with intent to steal.

Now, as I have already told you, the essence of robbery is the exertion of force, either actual or constructive, against another in order to take property of any value whatsoever, with the intention of stealing it, from the protection which the person of the other affords.

The exertion of force may be either actual or constructive. Actual force is force when applied to the body of the victim. Constructive force is accomplished by threatening words or gestures which operate on the mind and put the victim in fear, as a result of which the actual unlawful taking of money or property is effected.

As I have already told you, robbery requires that force be exerted, either actual or constructive. Either kind fills the requirements of the law; but if putting in fear or constructive force is the element proved, the victim must be

put in fear and be fearful or frightened at the time the money or the property alleged to have been taken was taken from his custody.

The state of fear or fright must be a factor in the taking of the property from his possession. Fear, terror, or apprehension of harm on the part of the victim is an essential ingredient of the crime of robbery by constructive force.

Now, Mr. Foreman, members of the jury, the defendant doesn't have to prove anything. The burden is upon the Commonwealth to prove this defendant guilty and prove it beyond a reasonable doubt. The defendant does not have the burden of proving that he is innocent.

Now, you will recall that during the course of this trial this defendant did not take the stand and testify in his own behalf. I call to your attention the provisions of one of the laws of our Commonwealth, namely, Chapter 233, Section 20, Clause 3, which reads as follows — I am now quoting from this particular clause — "The defendant in the trial of an indictment, complaint or other criminal proceeding shall, at his own request, but not otherwise, be allowed to testify; but his neglect or refusal to testify shall not create any presumption against him." That is the end of the quote of that particular clause.

Mr. Foreman, members of the jury, silence can not be taken into consideration by you in determining whether a defendant is or is not guilty. If a defendant remains silent, the law jealously guards and preserves his rights, cuts off injurious comments, and as far as possible protects him from unfavorable inferences.

A defendant has the right to simply deny his guilt and rely on the legal presumption of his innocence, and no presumption or inference against him shall be drawn by you, the jury, because of his neglect or refusal to testify.

That means, Mr. Foreman, members of the jury, that a

defendant in a criminal case is not required to produce any evidence in his own favor or testify upon the stand. He is not bound to furnish any evidence. He is under no obligation to speak. The burden is upon the Commonwealth to prove that he is guilty of this particular offense and prove it beyond a reasonable doubt.

Now, Mr. Foreman, members of the jury, you heard testimony during the course of this trial that the defendant at the time of this alleged offense was some miles away in the Villa Nova Lounge, and this is what is called an alibi, that this accused was elsewhere at the time that this alleged offense took place.

If this is true, — it being impossible that the accused should be in two places at the same time — it is a fact inconsistent with that sought to be proved and excludes its possibility.

In the famous case of Commonwealth versus Webster, Volume 59 of the Massachusetts Reports, the then Chief Justice, Chief Justice Shaw, one of the great Chief Justices of the Supreme Judicial Court of this Commonwealth, had this to say about the defense of alibi, and I am now reading from this particular decision.

"This is a defense often attempted by contrivance, subornation, and perjury. The proof, therefore, offered to sustain it is to be subjected to a rigid scrutiny because, without attempting to control or rebut the evidence of facts sustaining the charge, it attempts to prove affirmatively another fact wholly inconsistent with it; and this defense is equally available, if satisfactorily established, to avoid the force of positive, as of circumstantial evidence. In considering the strength of the evidence necessary to sustain this defense, it is obvious that all testimony tending to show that the accused was in another place at the time of the offense, is in direct conflict with that which tends to prove that he was at the place where the crime was committed and actually committed it. In this conflict of evidence, whatever tends to

support the one tends in the same degree to rebut and overthrow the other; and it is for the jury to decide where the truth lies."

Now, Mr. Foreman, members of the jury, from the very beginning of this trial until the very end, the burden is upon the Commonwealth to prove this defendant guilty and prove it beyond a reasonable doubt. The burden is also upon the Commonwealth not only to prove beyond a reasonable doubt that this defendant is guilty of this particular offense, but the burden is upon the Commonwealth to prove and to prove beyond a reasonable doubt each and every fact essential to the guilt of this defendant on this particular charge.

Now, what do we mean by a reasonable doubt? Mr. Foreman, members of the jury, proof beyond a reasonable doubt does not mean proof beyond all doubt, nor beyond a whimsical or fanciful doubt, nor proof beyond the possibility of innocence. A reasonable doubt does not mean such doubt as may exist in the mind of a man who is earnestly seeking doubt or an excuse in which to acquit a defendant. But it does, however, mean such doubt as remains in the minds of reasonable men and women who are earnestly seeking the truth.

A fact is proved beyond a reasonable doubt when it is proved to a moral certainty, when it is proved to a degree of certainty that satisfies the judgment and conscience of you, the jury, as reasonable men and women and leaves in your minds as reasonable men and women a clear and settled conviction of guilt.

But if there remains in your minds any doubt as to the existence of any fact which is essential to the guilt of this defendant on this particular charge, the defendant must have the benefit of that and he can not be found guilty of this particular charge.

Now, Mr. Foreman, members of the jury, an indictment for armed robbery necessarily includes the lesser offenses

of robbery not being armed, assault, and larceny. When you retire to your jury room and consider your verdict, you should first consider the charge set forth in this indictment, robbery while armed with a dangerous weapon.

If you, the jury, find that the Commonwealth has proved its charge beyond a reasonable doubt, then when you return to the courtroom and when you have been inquired of by the Clerk, then, Mr. Foreman, you will simply reply: Guilty. And the other jurors will be asked the usual question of affirmation.

However, if you, the jury, find the Commonwealth has not proven this charge of robbery while armed beyond a reasonable doubt, then you will consider the issue of whether or not this defendant is guilty of robbery not being armed.

If you, the jury, find the Commonwealth has proven beyond a reasonable doubt that this defendant is guilty of robbery not being armed with a dangerous weapon, you, Mr. Foreman, when being inquired of by the Clerk, will simply reply: Guilty of robbery not being armed with a dangerous weapon.

If you, the jury find that the Commonwealth has not proven this charge beyond a reasonable doubt, then you will consider the offense of assault and larceny.

If you, the jury, find that the Commonwealth has proved beyond a reasonable doubt either an assault or larceny, then when you return to the courtroom, when you are inquired of, Mr. Foreman, by the Clerk, you will announce him guilty of the offense that you find him guilty of.

If you, the jury find that the Commonwealth has not proven beyond a reasonable doubt each and every fact essential to the guilt of this defendant in any one of these four offenses, then when you, the jury, return to this courtroom and you, Mr. Foreman, are inquired of by the Clerk, you will simply announce: Not Guilty.

So, Mr. Foreman, and members of the jury, there are five possible verdicts in this case for your consideration.

First, guilty, which will mean guilty of robbery while armed with a dangerous weapon. That is guilty of the whole offense.

Secondly, guilty of robbery not being armed.

Thirdly, guilty of assault.

Fourth, guilty of larceny.

Fifth, not guilty.

Now, the verdict arrived at by you, the jury, must be unanimous no matter how great the majority, it will not satisfy that requirement of the law.

I am submitting this case to you, the jury, for your determination. I am submitting it to you in the confidence that you will approach the task allotted to you fairly and impartially. At the ouset of this trial you took solemn oaths to try the issues between the Commonwealth and this defendant fairly and impartially as people of conscience, realizing the solemnity of that oath and its meaning.

Approach the performance of your duty with courage and with a firm desire to accord to each side that measure of justice to which each is entitled.

As I have already told you, the defendant's rights require the Commonwealth to prove and prove beyond a reasonable doubt that he is guilty, and this is an absolute right.

It is equally the right of the Commonwealth to a conviction if and so far as you, the jury, find that this charge has been sustained.

Mr. Foreman, members of the jury, this case is now in your hands. Speak the truth in your verdict.

THE CLERK. Officers to be sworn.

You solemnly swear that you will keep this and all other juries committed to you at this sitting of the Court in some convenient place until they have agreed. You are to suffer no person to speak to them nor speak to them yourselves unless by order of the Court. You will not suffer them to be dispersed until they have been discharged of their verdict. So help you God.

APPENDIX B

Stenographic Transcript of Trial Court Clerk's Collective Inquiry to Jury

THE CLERK. Members of the jury, you will hearken to your verdict as recorded by the Court.

The jurors upon their oath do say that the defendant is guilty of armed robbery.

So say you, Mr. Foreman — members of the jury, you will hearken to the verdict as recorded by the Court. The jurors, upon their oath, do find that the defendant is guilty of armed robbery while being armed with a dangerous weapon.

So say you, Mr. Foreman?

THE FOREMAN: Yes.

THE CLERK. So say you all, members of the jury?

(General "yes".)

THE COURT. Mr. Foreman, ladies and gentlemen of the jury, thank you very much for your service here as jurors. You are to return to the jury pool tomorrow morning.

APPENDIX C

**Excerpt from Brief for Defendant,
Commonwealth v. Richardson, 354 Mass. 773 (1968),
Concerning Denial of Petitioner's Motion to Poll the Jury**

II.

THE COURT ERRED IN DENYING DEFENDANTS MOTION TO POLL THE JURY.

In the case of *Costley* v. *Commonwealth,* 118 Mass. 1, 28, the court stated that "In Massachusetts, it has never been the right of a party, in any case, civil or criminal, to have the jury polled." This does not preclude the opportunity to poll the jury, but instead, it is discretionary with the trial court.

In 1959, in answer to this question, the Massachusetts court replied:

> "After the verdicts were read the defendant moved to poll the jury. This motion was denied and an exception was saved. There is no merit in the exception. The point raised was decided adversely to the defendant's contention in *Commonwealth* v. *Costley.*"
> *Commonwealth* v. *Goldenberg* (1959), 338 Mass. 377, 386.

This also should not preclude the right to poll the jury, but rather should make it discretionary with the trial court. Although the authorities differ on the requirement of the right to poll, none preclude the right.

> "The authorities treating of the question are divided as to whether the polling of the jury is an absolute right of a party in a criminal proceeding. It has been held that neither side has a right to have the jury polled, but whether this shall be done rests in the discretion of the court."
> 23A Corpus Juris Secundum 1048.

Among the cases cited for the latter statement is the above cited *Commonwealth* v. *Goldenberg*.

> "The object of polling the jury is to give each juror an opportunity to declare in open court his assent to the verdict as returned, and to ascertain for a certainty that each juror approves of such verdict and that no one has been coerced or induced to agree to a verdict to which he does not fully assent."
>
> 23A Corpus Juris Secundum 1047.

As time has gone by, the courts have become more aware of the importance of polling a jury. The Federal Rules of Criminal Procedure state *that:*

> "When a verdict is returned and before it is recorded the jury shall be polled at the request of any party or upon the court's own motion."
>
> Federal Rules of Criminal Procedure, Rule 31D.
>
> "In some jurisdictions, however, either of the parties may claim as of right to have the jury polled, and the action of the court in denying this right is reversible error."
>
> 23A Corpus Juris Secundum 1048.

and fourteen jurisdictions are cited for authority.

> "The right of the defendant to have the jury polled as thus recognized and established by Federal Rule 31(D) is of ancient origin and of basic importance."
>
> *Miranda* v. *United States*, 255 F.2d 9, 17 (1st Cir.)

Although the Supreme Court has never passed on the question directly, it has indicated an awareness of the importance of polling a jury. "The right to poll a jury is certainly no more sacred than the right to have a jury." *Humphries* v. *District of Columbia*, 174 U.S. 190, 195 (1899).

In the instant case, a mistrial was declared by the court on September 13, 1967, because of a hung jury. At the new trial on November 8, 1967, the jury retired to deliberate at 11:10 A.M. and returned at 11:14 P.M. unable to reach a decision.

The jury was instructed that "Although the verdict to which a juror agrees must, of course, be his own verdict, the result of his own convictions, and not a mere acquiescence in the conclusion of his fellows, yet, in order to bring twelve minds to a unanimous result, you must examine the questions submitted to you with candor and with a proper regard and deference to the opinions of each other. You should consider that the case must at some time be decided; that you are selected in the same manner, and from the same source, from which any future jury must be; and there is no reason to suppose that the case will ever be submitted to twelve men or women more intelligent, more impartial, or more competent to decide it, or that more or clearer evidence will be produced on the one side or the other. And with this view, it is your duty to decide the case, if you can conscientiously do so. In conferring together, you ought to pay proper respect to each other's opinions and listen, with a disposition to be convinced, to each other's arguments.

A proper regard for the judgment of other men will often greatly aid us in forming our own. In many of the relations of life, it becomes a duty to yield and conform to the opinions of others, when it can be done without a sacrifice of conscientious convictions, more especially is this a duty when we are called on to act with others, and when dissent on our part may defeat all action.

The jury room is, surely, no place for pride of opinion or for espousing and maintaining in the spirit of controversy either side of a cause. The single object to be there affected is to arrive at a true verdict and this can only be done by deliberation, mutual concession, and a due deference to the opinions of each other. By such means and such only, in a body where unanimous agreement is required, can safe and just results be attained, and without them, the trial by jury, instead of being an essential aid in the ad-

ministration of justice, would become a most effectual obstacle to it."

This is nothing but an appeal for the jury to go along with the majority view. In effect, it is a request for a few jurors to find the defendant guilty by changing their minds. This brings up the question as to whether or not the individual jurors "sacrificed their conscientious convictions" in yielding to the majority. The opinions expressed must be the true opinions of the jurors and not an opinion molded to conform with a desire not to "defeat all action" and not to become "a most effectual obstacle to it (the administration of justice). To allow this instruction to stand is to encourage trial judges to devise subtle means of coercing minority jurors to give in to the majority.

The jury retired to deliberate at 11:20 P.M. and returned at 12:20 A.M. The jury had been out now for a total of thirteen hours. It is clear that there was some doubt in someone's mind.

The jury consisted of two women, a male juror with a physical disability, and several other older jurors. These people had been deliberating for thirteen hours and there was no apparent end in sight. Either they came back with a decision or they remained out.

Given the physical makeup of the jury and the time element involved, it is clear that there was physical duress involved. The jurors were thus highly susceptible to assenting to a decision in which some of them did not agree. As stated previously, there was a disagreement between the jurors and then there was an agreement, which given the totality of the circumstances is highly suspect.

It is this danger which the polling of a jury is designed to prevent. It is to "ascertain for certainty that each juror approves of such verdict and that no one has been coerced or induced to agree to a verdict to which he does not fully assent." 23A. Corpus Juris Secundum 1047.

Keeping the facts of this case in mind, the dangers are so apparent and so great, that a denial of the right to poll the jury, although not an absolute right, constituted an abuse of discretion in the instant case and is thus reversible error.

APPENDIX D

Excerpt from Brief for Defendant, Commonwealth v. Richardson, 1972 Mass. Adv. Sh. 869, Concerning Denial of Petitioner's Motion to Poll the Jury

B. *The Refusal to Poll the Jury Constituted An Abuse of Discretion.*

One trial involving virtual identity of witnesses in this matter resulted in a hung jury (Ex. B). The verdict of guilty in the second trial was returned after the jury had deliberated for some 12 hours from 11:10 A.M. to 11:14 P.M. (Ex. A, p. 151), been given the *Tuey* or "dynamite" charge and sent back out at 11:20 P.M. (Ex. A, p. 153) and returned 1 hour later at 12:20 in the morning (*id.*). It is entirely conceivable that one or more jurors were coerced by their fellows into their verdict because of the lateness of the hour and the giving of the *Tuey* charge and might have so stated if polled .We respectfully submit that under these circumstances an abuse of discretion occurred when the court below denied the motion to poll the jury. Indeed, one is hard put to discern any reason why the court below should have denied the motion. No legitimate interest of The Commonwealth or the courts thereof is furthered by denial of such a motion. And the facts referred to immediately above indicate that if ever a poll was appropriate, this was the case. Indeed, if the denial of a poll did not constitute an abuse of discretion here, then we respectfully submit there is virtually no case where it would.

AUG 30 19

MICHAEL RODAK, JR., CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-5115

JAMES W. RICHARDSON,
PETITIONER,

v.

COMMONWEALTH OF MASSACHUSETTS,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

ERRATA TO BRIEF FOR THE COMMONWEALTH OF MASSACHUSETTS IN OPPOSITION

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ERRATA

P. 10, line 29:	"1, 4, 10, 11, 12, 13 and 14" should read "24, 27, 33, 34, 35, 36 and 37."
P. 10, line 32:	"12-13" should read "36-37."
P. 19, line 16:	"15" should read "38."
P. 20, line 15:	"16-20" should read "39-43."
P. 20, bottom line:	"Appendix E" should read "Appendix at 44."